Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

SONGBYRD, INC.,
Petitioner,

vs.

ESTATE OF ALBERT B. GROSSMAN, D/B/A BEARSVILLE RECORDS
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

JUSTIN ASHER ZITLER
(*Counsel of Record*)
LAWRENCE J. GOLDSTEIN
2833 Napoleon Avenue
New Orleans, Louisiana 70115
(504) 897-0886

Attorneys for Petitioner
SongByrd, Inc.
The Professor Longhair Company
A Louisiana Corporation

31pp

QUESTIONS PRESENTED

Introductory statement:

The procedural history is a necessary guide to understanding the questions presented. The cause of action, particular to the Louisiana Civil Code, is revendication. The Respondent removed the action to federal court, which dismissed as time barred under Louisiana law. The Fifth Circuit reversed the lower court's decision, and remanded, concluding under Louisiana law that the action was timely. Without identifying a statutory basis, the lower court transferred the case *sua sponte* to the Northern District of New York where the case was dismissed as being time barred under New York law. Petitioner was therefore compelled to appeal to the Second Circuit on 1.) the transfer, and 2.) the questions of timeliness and governing law. The Second Circuit affirmed the district court's ruling that the case was time barred under New York law, and concluded that Petitioner could not assert personal jurisdiction on the revendicatory action under the Due Process Clause.

The following questions are presented:

1. After the Court of Appeals for one circuit determines on summary judgment that an action is not time barred, whether another Circuit Court thereafter, upon a second motion for summary judgment, may determine that the same cause of action is time barred?

2. Whether a district court's *sua sponte* transfer of a case, based solely on a finding of lack of personal

jurisdiction, and without citation of statutory authority, entitles either party to directly appeal as of right to the appellate court familiar with the substantive civil law cause of action under which personal jurisdiction is asserted?

3. Under Louisiana law, whether a non-resident precarious possessor of a corporeal moveable, who concedes that his ancestor in title is the petitioner herein, can reasonably anticipate being haled into a Louisiana State court, consistent with the Due Process Clause, to respond to the Louisiana resident owner's state law cause of action for revendication of ownership in and to the corporeal moveable?

4. Whether the Second Circuit committed manifest error in its application of New York law to the case at bar?

5. Whether the Second Circuit committed manifest Constitutional error by collapsing the issue of personal jurisdiction to a federal "minimum contacts" standard, without first considering the reach of the Louisiana Long-Arm Statute, the Louisiana property law cause of action, the New York resident's relationship to the master recordings, and the New York resident's purposeful disregard of the forum state's interest in protecting ownership of Louisiana resident's artistic creations?

6. Whether the Court should exercise its supervisory jurisdiction to instruct Article III judges that the duty to avoid reliance upon the Constitution is the accepted and usual course of judicial proceedings, and that widespread departure therefrom is impermissible.

PARTIES TO THE PROCEEDING

FOR SONGBYRD, INC.:

Frances Brown
Reverend Alexander E. Byrd
Barbara Walton
Patricia Walton (a/k/a Pat Byrd)
Randy Opotowsky, Esq.

There is no parent or publicly held company owning 10% or more of the corporate stock.

OTHER INTERESTED PARTIES

Arthur Q. "Quint" Davis
Parker Dinkins, Esq.
Robert Heslin, Esq, (Heslin & Rothenberg Law Firm)

FOR THE ESTATE OF ALBERT B. GROSSMAN: D/B/A BEARSVILLE RECORDS, INC.

Sally Grossman
Denise C. Puente
Christine Belew, Esq, and the law firm of Simon, Peregrine. Mario Cometti, Esq. Ryan, Orlando, and Smallacombe Law Firm.

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PETITION FOR WRIT OF CERTIORARI

SongByrd, Inc., a closely-held Louisiana family corporation whose sole asset is the set of intellectual property rights of Henry Roeland Byrd, professionally known as "Professor Longhair" ("SongByrd") respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 10, 2000, in order to resolve the conflict herein with the opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 4, 1997.

ORDERS AND OPINIONS BELOW

This action was commenced by Petition in Civil District Court for the Parish of Orleans (App. F), filed on August 14, 1995. After removal by respondent to the Eastern District of Louisiana, the Honorable G. Thomas Porteous, Jr. dismissed the case by order and reasons entered June 19, 1996, WL337259 (E.D. La (App. A). The United States Court of Appeals for the Fifth Circuit reversed and remanded, SongByrd, Inc. v. Bearsville Records, Inc., 104 F. 3d. 773 (5th Cir. 1997), decided February 4, 1997 (App. B). On remand, the District Court ordered a transfer and a remand of the case to the

Northern District of New York (App. E), entered May 9, 1997. After Answer filed by Respondents (App. G) in the Northern District of New York, Magistrate Judge David R. Homer presiding, dismissed the case by order and reasons entered September 21, 1998, SongByrd, Inc. v. Estate of Grossman, 23 F. Supp. 2d 219 (N.D.N.Y. 1998) (App. C). The United States Court of Appeals for the Second Circuit affirmed the dismissal by order entered March 10, 2000, SongByrd, Inc. v. Estate of Grossman, 206 F.3d. 172 (2nd Cir. 2000) (App. D).

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254(1), timely filed within 90 days of the final decision rendered in SongByrd, Inc. v. Estate of Grossman, 206 F. 3d. 172 (2nd Cir. 2000), on March 10, 2000, upon the petition of any party to any civil case.

STATUTES INVOLVED IN THIS CASE

La. C.C. Art. 526.
Recognition of ownership; recovery of the thing:

The owner of a thing is entitled to recover it from anyone who possesses or detains it without right and to obtain judgment recognizing his ownership and ordering delivery of the thing to him.

U.S. Const. Amend. XIV, § 1
Reads in pertinent part:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

For a full statutory appendix, please see Appendix H.

STATEMENT OF THE CASE

If possession is nine tenths of the common law of property, then the civil law of property provides the other tenth: revendication of ownership.

This case is about a property right, perhaps peculiar to the only civilian jurisdiction in the nation, but nonetheless and most surely a creature of the sovereign state of Louisiana.

The Court last visited the civil law action of revendication in Ellis v. Davis, 109 U.S. 485, 3 S.Ct. 327 (1883). Recognizing the distinction drawn by the Louisiana Supreme Court between opened and closed Successions: "If the succession...has proceeded so far that the parties entitled under the will have been put into possession of their rights to the estate, then the resort of adverse claimants must be to an action of revendication..." 109 U.S., at 499.

In support of its dismissal of the complainant's action, the Court stated:

> The present suit is not an action for nullity, because it prays for the recovery of possession of the inheritance, to which the appellants [complainants] claim the legal title as heirs at law of Sarah Ann Dorsey. **That claim...is properly the subject of an action of revendication[1], which**

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[1] In support of its dismissal, the Court exhaustively surveyed the early Louisiana cases on revendication: O'Donogan v. Knox, 11 La. 384 (1837) (testament in probate not subject of action of revendication); Robert v. Allier's Agent, 17 La. 4 (1841) (district courts are the proper tribunal when action in revendication is brought by an heir at law against an heir in possession); Rachal v. Rachal, 1 Rob. (La.) 115 (1841) (probate proceedings are not binding on action in revendication in courts of ordinary jurisdiction); Succession of Duplessis, 10 Rob. (La.) 193 (1845) (Probate proceedings are preliminary and not binding for purpose of action in revendication); Succession of Dupuy, 4 La. Ann. 570 (1849) (courts of ordinary jurisdiction are proper for revendication action to set aside defendant's claim over property) (see also Sophie v. Duplessis, 2 La. Ann. 724 (1847); Abston v. Abston, 15 La. Ann. 137 (1860); Sharp v. Knox, 2 La. 23 (1830) to same effect); Hoover's Succession v. York, 30 La. Ann.

> **furnishes a plain, adequate, and complete remedy at law...** Id. at 338 [emphasis supplied].

The Court's survey of La. Law recognized that revendication applied to moveables as well as to immoveables, but the petitory action came to replace the revendicatory action for immoveables and the revendicatory action was relegated to nothing more than commentary in the subject of scholarly treatises on the civil law. (App. B, p. 14-21).

Over the ensuing 100 odd years, Louisiana courts have struggled[2] with the revendicatory action, possibly because none of the cases recognizing it had articulated the textually demonstrable Civil Code basis for it: Article 526.

The re-awakening[3] of Codal Article 526 by the Fifth Circuit[4] provides the Estate of Professor Longhair with a

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752 (1878) (matter incidental to opening and settlement of a succession); Blasini v. Blasini's Succession, 30 La. Ann. 752 (1878) (suit of probate jurisdiction not closed by previous judgment of possession); Gibson v. Dooley, 32 La. Ann. 959 (1880) (No revendication action for want of prayer for ejectment or prayer to be put into possession of property claimed under the will).

[2] See, for example Witson v. Succession of Staring, 175 So. 495 (La. App. 1 Cir. 1937); Cooney v. Blythe Co., 200 so 517 (La. App. 1 Cir. 1941); Stephens v. Drake, 134 So.2d 674 (La. App. 2 Cir. 1961); Travelers Ins. Co. v. First Nat. Bank of Shreveport, 675 F.2d 633 (5th Cir (La.) 1982).

[3] "The law hath not been dead, though it hath slept." William Shakespeare, Measure for Measure, act 2, sc. 2, ln. 178. Desuetude is no more applicable to a civil code article than it would be to a clause in the Constitution of the United States.

property law cause of action capable of revendicating the master recordings from which resulted the 1987 Grammy award-winning album **"House Party New Orleans Style: The Lost Sessions 1971-72"**. Petitioner alleges the masters were brought to Bearsville Studio in Woodstock, New York, at the request of Respondents, and were inadvertently left there by JazzFest founder Quint Davis in 1972 (App. F, p.69). The Fifth Circuit has rendered a scholarly opinion herein (App. B, pp. 6-28), of special interest to civil and constitutional law jurisprudence, under which SongByrd's revendicatory action has not yet accrued, much less expired.

The transportation and shipping of chattels, of things, across state lines, has never been so commodious as it is

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[4] More accurately, the meaning of La. Civil Code Art. 526 was explained in dicta less than a week before the Fifth Circuit's decision in SongByrd I:

> The problem with the Parish's reliance upon Art. 526 is that the Article gives rights to the *present owner* of the thing to be recovered. That is, Article 526 *presupposes* that the plaintiff already is the owner of the thing to be recovered. *See generally 2 Yiannopoulos, Louisiana Civil Law Treatise: Property 350 (3d. Ed. 1991)"* Plaquemines Parish Commission Council v. Delta Development Co., Inc., 688 So. 2d. 169, at 175 (La. App. 4th Cir. 1997).

Apparently Judge Weiner's "Erie-guess" in SongByrd I was quite accurate, for this appellate court is the one in which appeal would lie had Respondent not removed the case *sub judice* to the Eastern District. Of more importance to the writ at hand is the jurisdictional notion of a *present owner*, which implies that the legal situs of the moveable for which revendication is sought has never left Louisiana, wherever the moveable may physically be found.

today[5]. Of what good is the right of revendication without a remedy that reaches across state borders and international datelines? Determining the reach of the Louisiana Long-Arm Statute is critical to the viability of this particular cause of action protecting ownership as a state-created property right in an increasingly global and digitally connected world.

In this case, SongByrd I mandated that the District Court on remand "address the issue of personal jurisdiction"[6] upon which it could have expressed no

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[5] And, concomitantly, we have suffered catastrophic cultural displacements of treasures and artworks engendered by the World Wars. See, generally, The Spoils of War (Elizabeth Simpson Ed., Harry N. Abrams, Inc., Pub. 1997).

[6] We do not know the basis for the Eastern District court's transfer, so we do not know the standard the court applied. The applicable standard, however, appears to be less rather than more:

> When a court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing [as was the situation here]...the non-moving party need only make a prima facie showing, and the court must accept as true the non-mover's allegations and resolve all factual disputes in its favor [citations omitted]. Guidry v. U.S. Tobacco Co., Inc., 188 F. 3d. 619, 625 (5th Cir. 1999).

The lack of statutory basis is a compelling reason for the Court's guidance, in and of itself. Possible statutory basis exists in only 3 statutes: 28 U.S.C. §1404(a), §1406(a), and §1631. The Second Circuit in SongByrd II believes that §1631 treats of subject-matter, and not of *in personam* jurisdiction (see App. D, pp. 52-3, fn.9); the "interests of justice" under §1406(a) can hardly be served where non-mover's best litigation strategy is to take the unheard-of risk of voluntary dismissal and then appeal one's own dismissal; also there appears no certification under 28 U.S.C. §1292(b); finally, as to §1404(a), the court-initiated transfer, in opposition

opinion "at this juncture"[7] (App B, p. 28). The issue ought not to have been pretermitted by the Eastern District in the first place (App. B).[8]

Yet, the Eastern District judge transferred because he found "a lack of personal jurisdiction" (App. E, p. 65) on remand, presumably under the Louisiana Long-Arm

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to both parties, is one of the very questions left open by the Court in Ferens v. John Deere Co., 494 U.S. 516, 530 (1990). See also Van Dusen v. Barrack, 376 U.S. 612 (1964).

[7] It should be noted that Petitioner, while focusing on specific jurisdiction, has always asserted and has never waived general jurisdiction. The Fifth Circuit's "stream of commerce" analysis is very broad, and "should be examined under the stream of commerce standard as set forth in Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 62 L. Ed. 2d. 290, 100 S. Ct. 559 (U.S. 1980) and explained in Bean Dredging Corp., 744 F. 2d at 1083 (1081)" U.S. v. Avondale Industries, Inc., 841 F. Supp. 180, 184 (5th Cir. 1993). Under Avondale and the facts of the case at bar, the Fifth Circuit would be likely to find that the mere sales of the record **"House Party New Orleans Style"** by Respondent's licensee in Louisiana is sufficiently foreseeable to satisfy the stream of commerce theory for assertion of general *in personam* jurisdiction.

[8] "The question of the applicability of [the forum state's] statute of limitations...presents itself in the course of litigation only after jurisdiction over respondent is established, and we do not think that such choice of law concerns should complicate or distort the jurisdictional inquiry." Metropolitan Life Insurance Co., v. Robertson-Ceco Corp, et. al. 84 F.3d 560, 574 (2nd Cir. 1996) (Citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778, 104 S. Ct. 1473, 1480 79 L.Ed.2d. 790 (1984)).

Statute[9], for he made no mention of the Due Process Clause.

Respondents received a bonus for the change in forum: a change in law. Petitioner was compelled to litigate under a limitations law far less subtle in the area of property law than is the civilian tradition.[10]

Then, the Second Circuit announced a new circuit procedural rule in this case, that Petitioner ought to move for retransfer before the Northern District, knowing full well that an adverse decision would be a foregone conclusion, for the sole reason of supporting the Second

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[9] Petitioner's argument for the exercise of personal jurisdiction under La. Code of Civil Procedure Article 13: 3201 (5) (App. H, p. 85) has not changed one whit:

> The design of the statute is to reap the 'fullest benefit' from United States Supreme Court cases relaxing constitutional due process requirements as such pertain to personal jurisdiction in civil suits...to tap the full potential of jurisdiction *in personam* over nonresidents...These two comments indicate the broad scope of subsection (5), showing that it embraces "real rights" as well as 'immovable property', and that it is intended to encompass all those rights traditionally classified as 'real rights'. Mayeux v. Hughes, 333 S. 2d. 273, 275 (La. App. 1st Cir. 1976).

Coupled with SongByrd I's Erie-analysis of revendication as a 'real right', the "present owner" dictum in Plaquemines Parish, supra, fn. 4., and the mere prima facie showing required Guidry supra, fn. 6 it is highly likely that the Louisiana Supreme Court would assert such jurisdiction *in personam* over Respondent in this case, under this cause of action.

[10] A common myth is that the Louisiana Civil Code only dates back to the Code Napoleon, but if truth be told, the property law Articles date back one and a half millennia, to the Code of Justinian c. 500 A.D.

Circuit's jurisdiction to review the transfer order of the transferor court. (App. D, p. 49)

The Second Circuit concedes that the choice of law was outcome-determinative (App. D, pp.53-55), and purports to address the question of paramount importance to the State of Louisiana's action in revendication (App. D, p. 56-58)

In light of the newly recognized substantive cause of action for revendication of moveable, how, if at all, is the Louisiana Long-Arm Statute broadened and extended? May it reach across state lines to assert a revendicatory claim against the precarious possessor of the resident's moveable property, where that precarious possessor sets up his title through acknowledging the owner's common ancestry? (See Answer, App. G pp. 78-81).

Yet the Second Circuit, in clear disregard of its own jurisprudence[11], fails to consider state law at all[12], and

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[11] There thus exists an overwhelming consensus that the amenability of a foreign corporation to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits, with "federal law" entering the picture only for the purpose of deciding whether a state's assertion of jurisdiction contravenes a constitutional guarantee. [Footnote omitted]... State statutes determining what foreign corporations may be sued, for what, and by whom, are not mere whimsy; like most legislation they represent a balancing of various considerations—for example, affording a forum for wrongs connected with the state and conveniencing resident plaintiffs, while avoiding the discouragement of activity within the state by foreign corporations. We see nothing in the concept of diversity jurisdiction that should lead us to

instead collapses the two-part inquiry into one (App. D, p. 57).

On the basis of specific *in personam* jurisdiction, the one and only State in the Union into which New York Respondent could reasonably anticipate being summoned for the purpose of defending his muniment of title to the master recordings at issue is the State of Louisiana.

Your petitioner SongByrd, The Professor Longhair Company, has been denied a meaningful review and an appeal as a matter of right[13] under the Louisiana law of revendication and the Louisiana Long-Arm Statute, by two district courts and two circuit courts of appeals.

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read into the governing statutes a congressional mandate, unexpressed by Congress itself, to disregard the balance thus struck by the states. [fn.6]

[fn.6] The diversity clause of Article III was not one of the provisions of the Constitution about which the founders felt very deeply. Madison thought it was not "a matter of much importance. Perhaps it might be left to the state courts" 2 Elliot, Debates on the Federal Constitution (1828), at 391. Marshall conceded in the Virginia convention, "Were I to contend, that this was necessary in all cases, and that the government without it would be defective, I should not use my own judgment."

Arrowsmith v. United Press Int'l, 320 F. 2d 219, 223, 226 (2nd Cir. 1963).

[12] Lack of "familiarity" with Louisiana law is no excuse, as is clearly shown by the Court's exhaustive survey of revendication cases in Louisiana prior to 1883, see Ellis v. Davis, supra, fn. 1.

[13] 28 U.S.C. 1294 (1).

REASONS FOR GRANTING THE WRIT

I.
The Second Circuit Committed Manifest Constitutional Error By Invoking The Constitution To Decide A State Law Matter

A. The improvident exercise of judicial review by the inferior courts ought be restrained by prudential concerns.

This case, about the other one tenth of the law of property, presents the Court with a jurisprudential opportunity *non-pareil*. The Court approaches constitutional interpretation just as the civilian jurist approaches a civil code. How else can historic reversals or departures from precedent be reconciled with *stare decisis*, other than to view the Constitution as the law of last resort? Each Article III judge, whether trial, appellate, or Justice, throughout the years, may draw anew[14] from the Constitution as their individual conscience and predilections dictate.

Indeed, the only difference between Constitutional jurisprudence and civilian jurisprudence is identifying the fount from which springs the power of judicial review; in

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[14] Compare Louisiana's jurisprudential approach, SongByrd I., at 777 (App. B, pp. 13), "...the doctrine of *stare decisis* does not apply. Instead, each judge, trial and appellate, may consult the civil code and draw anew from its principles." citing Alvin B. Rubin, Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the Erie Railroad, 48 La. L.Rev. 1369, 1372 (1988).

the proper case, to break free from precedent by invocation of the law of last resort. Marbury v. Madison[15] sets the one and only precedent to which the federal courts are always bound, to support and defend the Constitution against all challenges whatsoever. In civil law, the source of such power is more opaque.

Being bound by either the tradition or by the precedent not only empowers the civilian judiciary and the Article III courts with the right of judicial review, it also obligates these jurists to refrain from using that power except as a last resort.

> "O, it is excellent
> To have a giant's strength, but it is tyrannous
> To use it like a giant"[16]

Every Article III judge is constitutionally empowered, as must be the case under Marbury v. Madison, to reach the constitutional issue in any given case. However, it is up to the Court, and to this Court only, to exercise its supervisory jurisdiction over the judiciary for departing from the duty to avoid the constitutional issue if lesser

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[15] "It is emphatically the province and duty of the judicial department to say what the law is.... This is of the very essence of judicial duty." Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[16] Shakespeare, Measure for Measure, Act 2, sc. 2. The remainder of Isabella's response to Lucio is noteworthy as well:

> "Could great men thunder
> As Jove himself does, Jove would ne'er be quiet.
> For every pelting petty officer
> Would use his heaven for thunder: nothing but
> thunder.——
> Merciful heaven!"

grounds are available for decision. Very few state law matters ought rise to the level of a Constitutional decision.

B. The conflict here between co-equal circuit courts on the same issue and in the same case is indicative of a systemic lack of prudential concerns.

This diversity case, for instance, arising as it does out of substantive state property law, hardly calls for the exercise of the power of judicial review. Either the Louisiana Long-Arm Statute extends *in personam* jurisdiction under Louisiana substantive law to the non-resident Respondent under the facts and circumstances of the case, or not.

Your Petitioner has been to two circuit courts[17], and neither has addressed the state law question. The Fifth Circuit could not because the question was not presented to it by the Eastern District judge, and the Second Circuit could not because it has so far departed from the accepted and usual duty to avoid constitutional questions that it does not even pause before collapsing the state law issue into a constitutional question subject to the power of judicial review.

The Second Circuit committed manifest Constitutional error by reaching out to invoke Due

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[17] Conflicting Court of Appeals decisions in the same case, on the same issue (whether Petitioner's cause of action is time-barred), and in the same procedural posture (summary judgment), is reason enough to grant the writ under Supreme Court Rule 10(a), in order to untangle (or to cut through) the Gordian knot of litigation for this and for future cases.

Process while ignoring the state law analysis. Unfortunately, it is not alone. This is a problem of systemic proportion[18], and thus compels guidance only the Court can provide.

C. The common practice of Article III courts routinely entertaining the Due Process Clause defense to personal jurisidiction in diversity matters is an improvident exercise of judicial review that ought be restrained by the Court's supervisory authority.

Resort to the Due Process Clause has become as common in the civil law context as in the criminal law context, and perhaps more so. Are there any civil diversity cases pending in any district or circuit court in which the lack of personal jurisdiction is NOT plead as an affirmative defense?

Whatever has become of the notion that our Several States are to be encouraged to experiment with their laws with a minimum of federal intrusion? Louisiana's property law Article is just such an experiment. Moveable things tend to grow legs, and pay little heed to territorial boundaries. Absent the reach of the Long-Arm statute to follow the property across state lines and summon the non-resident precarious possessor into court, Louisiana

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[18] Wright and Miller, Federal Practice and Procedure, Civil 2d. Section 1075, "When the federal court is sitting in a state that has extended its jurisdictional reach to or near the limits permitted by the Constitution, it probably makes little difference whether state or federal law controls, since the two will be virtually identical."

residents would be homogenized into the common-law jurisdictions.

How will we the people know if the experiment to extend property law protection in revendication to Louisiana residents works or not if the experiment is aborted mid-term by the Due Process Clause?

The way things stand, there is, for all intents and purposes, a federal standard of review that sacrifices the unique character and culture of each state on the altar of uniformity. The case at bar is but one instance of many situations that simply do not rise to a level of Constitutional significance. Issues such as are presented here are best left to the State legislatures, the State tribunals, and to the federal circuit most familiar with the State's laws.

D. The Due Process Clause defense was improvidently entertained in this case.

The Constitutional issue is improvidently addressed where Petitioner's state-law created cause of action is one for Revendication of tangible personal property by the owner, and the defendant admits that his muniment of title derives from Petitioner.

The Respondent, under the forum state's law, is nothing more than a precarious possessor. The non-resident New York precarious possessor has no federally protected property interest upon which to base a Due Process Clause defense to Louisiana's assertion of *in personam* jurisdiction against the true owner, unless the

Court reaches the Constitutional issue by extending the 14th Amendment's protection against deprivation of a property right to a mere precarious possessor of master recordings presently owned by Petitioner[19].

There is simply no other source of "property interest" available to the Respondent, other than the possessory interest of the precarious possessor under the cause of action in revendication, where Respondent has been properly served through the Louisiana Long-Arm Statute, and has elected the federal forum through removal procedure from Louisiana State court.

Even if Respondent's mere possessory interest, the slimmest of all reeds of property under Louisiana law, does rise to the level of availing Respondent of the Due Process Clause defense, such defense ought not be entertained nor addressed until and unless the substantive cause of action is at least asserted under the state's Long-Arm Statute and considered[20], or else the dual instant proceedings on summary judgment become fundamentally unfair to the Petitioner, who is the party alleging in the first instance a deprivation of the

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[19] "The man that hath no music in himself... let no such man be trusted." Shakespeare, Merchant of Venice, Act 5, sc. 1.

[20] See, e.g. Arrowsmith, Ibid., at 223: "There thus exists an overwhelming consensus that the amenability of a foreign corporation to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits, with 'federal law' entering the picture only for the purpose of deciding whether a state's assertion of jurisdiction contravenes a constitutional guarantee."

possessory instance in property that Petitioner presently owns[21].

Once Respondent sets up its defense of title ownership to the property (see Answer, App. G, Affirmative defenses pp.76-81), then *a fortiori* 28 U.S.C. 1652, the jurisprudence thereunder, and notions of comity amongst the Several States dictate that state law ought to continue as the governing law.

However, the Second Circuit has said it need not consider this "unfamiliar"[22] Louisiana law in order to affirm the dismissal of this action under the Due Process Clause. The Second Circuit has entered the Constitutional dimension prematurely and improvidently.

What basis is there in the Constitution or in the United States Code for a federal court, sitting in diversity, to re-characterize Petitioner's substantive state-law created cause of action in Revendication as the common-law delictual action of conversion? (App. D, P. 58). There is none, and such a notion of comity[23] between the laws of the Several States may not be permitted to stand unaddressed.

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[21] See Plaquemines Parish, fn. 4, supra.

[22] (App. D P. 55, fn.12).

[23] Not to mention comity between co-equal courts. The Fifth Circuit has taken great pains to explain that revendication is a real action in property, not a tort, and thus not subject to liberative prescription (delictual limitations period) SongByrd I, at 777-80. (App. B, pp. 14-22).

The *in personam* jurisdiction issue implicated in this case is made out to be an issue of Constitutional import every day in every court in the land. The only common element your Petitioner sees in these matters is that the duty to avoid the Constitutional issue is "more honour'd in the breach than the observance"[24].

II.
The Problematic Transfer Order In This Case Is Indicative Of Systemic Overreaching In Diversity Matters Involving Personal Jurisdiction

Constitutional overreaching is at the heart of the problem with the transfer order (App. E, pp.64-5). In this very case, the Second Circuit simply made up a rule[25] for all future civil victims of the transfer morass: Move the transferee court for retransfer to the transferor court, suffer the denial of the motion ("to make it clear that its opposition in the transferor court was serious" App. D, pp. 49-50), and then the appellate court embracing the transferee's district will have the power and jurisdiction to review the transferor court's transfer order, through the constructive fiction of the denial of the motion to retransfer in the transferee court.

This approach merely treats the symptom and not the cause. Had the Eastern District judge ruled on *in personam* jurisdiction instead of pretermitting it, the Fifth Circuit

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[24] Shakespeare, Hamlet, Prince of Denmark act 1, sc. 4, ln. 34.

[25] App. D, p. 49.

would have had the authority to entertain the issue[26]. Further, had the Eastern District judge, on remand, dismissed for want of personal jurisdiction, your Petitioner would have appealed directly to the Fifth Circuit. In either circumstance, the Second Circuit would not have been faced with this problematic transfer order.

The instant litigation presents the opportunity to search the collective trust of the Court for a penetrating answer and for stern guidance in the avoidance of resort to the Constitution. Not every Article III judge need decide important Constitutional questions in every case on the docket, good behavior notwithstanding.

However, in diversity cases, the question of in personam jurisdiction ought follow the rule of Arrowsmith and be addressed first, under applicable state law, and only as a matter of last resort ought be decided under the power of judicial review.

The duty to avoid the Constitutional issue if lesser (state or federal) grounds are available for decision is not only sound, but also it preserves the wellspring of the Constitution itself, and thereby the Nation. It is the manifest duty of the Court to protect and defend the Constitution at all costs, even as against a well-meaning judiciary.

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[26] The case on appeal to the Fifth Circuit was in precisely the same procedural posture as Arrowsmith, Ibid. But there, the Second Circuit properly vacated the order of the district court and remanded with instructions to address *in personam* jurisdiction first.

CONCLUSION

For the reasons argued herein, the Court should grant the writ of certiorari to entertain one or more of the questions presented for review.

Respectfully submitted,

JUSTIN ASHER ZITLER
La. Bar # 18517
2833 Napoleon Ave.
New Orleans, La. 70115
(504) 897-0886
Attorney for Petitioner
SongByrd, Inc.
The Professor Longhair Company
A Louisiana Corporation